

From: Tony Palumbo
To: Microsoft ATR
Date: 1/4/02 12:50pm
Subject: Excellent Comments

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I'm forwarding this article (and it's link) as I feel it portrays the Microsoft settlement for what it really is (nothing more than a cleverly disguised scam)

Yes, the article is long, but should still be read

http://www.macobserver.com/news/2002/20020103/kheit_msantitrust.shtml

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Microsoft: Of Kids & Con Men
by John Kheit

Of Kids and Con Men

Microsoft seems to be trying to use kids and education to lull everyone into believing them. The hope seems to be that maybe no one will question that Microsoft's proposed settlement allows it to extend its monopoly product leverage into the educational market. It also seems that Microsoft would like everyone to believe that promising to be good monopolists under an honor system is a reasonable solution to anticompetitive practices. Perhaps next they'll suggest convicted drug dealers should be allowed to pay their debts to society by giving free crack to our kids, assuming of course they promise to not run other dealers out of the market. Give me a break.

Microsoft Settlement Jibber Jabber

The laudable goal of helping our kids with a proposed settlement that Microsoft wants to direct at schools may well be a cue that we're being suckered. Recently, Steve Jobs, the ever effervescent technology leader and CEO of both Apple and Pixar, chimed in with a chorus of other commentators to pooh-pooh on Microsoft's scandalous proposal to settle for its crime of being a naughty monopoly. Microsoft's proposal to settle a class-action, civil, antitrust lawsuit with various states and private parties could have it paying \$1.6 billion to schools, mostly by way of Microsoft software, as a settlement for its past misdeeds. Mr. Jobs claimed to be "baffled" by the proposal.

Some legislators have this nasty habit of packaging together nonsensical laws for rhetorical and/or other less-than-righteous reasons. It's interesting to note that our government doesn't see any hypocrisy in its normal operations employing tying and other trust-like activities for leveraging power to force the acceptance of questionable laws while not allowing industry to do the same with products. I expect that one day soon a bright legislator will draft a bill that declares his home address to be tax free zone, provides himself with billions in disaster relief, declares himself emperor of the world, and adds a law saying "you should be nice to kids." This bright legislator will do this for the same reason others have done it, to mask his true intentions. The hope in this sort of scheme seems to be that everyone will be too ashamed to vote down a bill that says "you should be nice to kids" for fear of rhetorical backlash. The fear of being criticized for voting against a bill that says "you should be nice to kids" can make people and legislators alike do stupid things like adopt laws that are otherwise illegitimate.

So why am I harping on the flimflam tactics of con men, terrorists and politicians alike (please, I know I'm being redundant) in an article about Microsoft? Because a scam may be afoot.

The reason for Mr. Jobs' and others' apparent consternation is if Microsoft gives its software to schools, it will incur no real penalty. Commentators state that approximately \$840 million of the settlement will come by way of Microsoft software, which would actually cost Microsoft approximately a paltry \$1 million. That's

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because making copies of its own software is essentially free for Microsoft. Furthermore, Apple and others fear that dumping that much Microsoft software into schools will shore up Microsoft's market position in the educational sector, where up until this point Microsoft has not managed to clearly dominate. Many commentators and Mr. Jobs have suggested Microsoft give the schools the entire settlement in cash. Of course, there is some degree of jibber jabber over the amount of cash that Microsoft should give to the educational sector, however, it seems that no one dares question the choice of market itself. That's crazy.

Only Microsoft Is Paying Attention to Relevant Markets

The fact that Microsoft chose the educational market, alone, should be a red flag to any practicing antitrust attorney. Most antitrust attorneys know that market definition at trial is largely determinative of the outcome. "Because market power is often inferred from market share, market definition generally determines the result of the case." Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 469 n.15 (1992) (citing Robert Pitofsky, New Definitions of Relevant Market and the Assault on Antitrust, 90 Colum. L. Rev. 1805, 1806-13 (1990)). For example, if Microsoft's marketplace were considered to be all software made anywhere for any processor, it would only hold a small percentage of that market. That's because most of the world's software is not made by Microsoft. For example, there is a lot of software in calculators, microwaves, cars, airplanes, missiles, telephones, mainframes, televisions, etc. Thus, if a court decided that the relevant market was all software, then it would have been very likely that Microsoft would not have been found to be a monopoly. On the other hand, if the relevant market was said to be Intel compatible personal computers, then Microsoft easily would be deemed a monopoly. You've probably heard this before, but it is important to note that it is not illegal, per se, to be a monopoly. However, once you are found to be a monopoly, it is illegal to abuse your monopoly power in anticompetitive ways. 15 U.S.C.A. Sect. 2; U. S. v. Grinnell Corp., 86 S.Ct. 1698 (1966); Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1353 (Fed.Cir. 1999). Regardless, depending on how the market is defined, one can pretty much predict if an accused company will be found to be a monopoly.

Microsoft's Solution Ignores the Victims

With this background, it is interesting that Microsoft would focus on a market where it is not currently dominant rather than giving the damages to parties that have been more directly injured by its anticompetitive practices. Its main victims, supposedly, were other software companies stunted or driven out of business (anyone remember Stacker?) and consumers that have been overcharged.

Consumers Overcharged

Some analysts posit that Microsoft overcharged individual consumers by as much as \$150 on products over the years. Many consumers were fleeced and forced to pay Microsoft a license fee for Windows when buying a computer even when they didn't want to run Windows or even when they already had a valid license for Windows. Microsoft evinced its recompense to the consumer by raising prices on Windows XP significantly.

Obvious Solutions Ignored

Certainly, there seem to be easy remedies that actually address and would affect Microsoft's monopoly power while providing compensation to both groups of victims. With regard to consumers, potential solutions may include: offering money to those that can show they were forced to buy unwanted Windows licenses, giving money back to OEMs (so they can lower prices on their non-Microsoft products), or giving cash to consumer groups to monitor any heavy handed tactics in the future. With regard to the software industry, individual companies that can show damages should be compensated, e.g., Netscape, or at the very least settlement money should go to the

Small Business Administration (or non-government analogues) for them to help software start-ups, which would promote more competition.

The most obvious places to send any settlement money would be to these victims. Otherwise the injured parties will have no redress for the damages wrought by Microsoft. Microsoft's current proposal is a little bit like offering to give money to a for-profit orphanage run by Microsoft as a punishment for having robbed a bank. Sure, some orphans may benefit (and probably will be trained to be future bank tellers), but Microsoft still keeps most of the money and the bank gets nothing. Of course, paying damages to the software industry would likely result in greater competition by infusing capital into a sector that certainly can use it. Furthermore, paying money to an independent watchdog consumer group would tend to prevent Microsoft from freely using its monopoly power in anticompetitive ways. I'm sure Microsoft had very conscious reasons for choosing the particular market of education and ignoring the two groups most directly affected by its anticompetitive actions, and I leave it to the reader to decide for themselves what those reasons were.

Counterproposals Make for Bad Law and Will Further Reduce Competition That's why it's so fascinating to me that with market determination being so central and critical in the world of antitrust that no one is questioning the choice of market for the settlement. I don't know of any parents that wouldn't at least question a proposed punishment for their children's wrong doings, if they were even liberal enough to allow their children to propose their own punishments in the first place. Regardless, the main counterproposals from commentators seem merely to concentrate on Microsoft settling with a full cash payment instead of supplementing the settlement with Microsoft software. The states' proposal basically would force Microsoft to license its source code and keep producing Microsoft Office for the Apple Macintosh and maybe Linux. Such suggestions seem to take one step forward and two steps back.

The step in the right direction is that Microsoft pay damages in cash. Last time I checked, this was still the United States of America and the official currency was a green-back and not a license for Windows. The step backward is that the state governments are considering requesting that Microsoft actually widen its Monopoly by having Microsoft enter new markets, either itself or through licensing, that it currently does not dominate, e.g., Linux. The states basically want Microsoft to open up its source code in return for licensing fees. Great! Now the states are basically making Microsoft's code essential. We've seen that even with supposedly open standards such as Java, HTML, etc. that individual companies are capable of steering and using those systems to proprietary effect.

One unpropitious scenario that may result from such a forced licensing system is that Microsoft technology would now become even more dominant. A significant collection of software developers on the Linux platform could be adversely affected by Microsoft bull dozing in with its Office suite; this would allow Microsoft to use Office as leverage to subvert the platform as it has often been accused of doing with the Macintosh platform. Where do you think most people (or at least most corporations) will buy their version of Office, Microsoft or some secondary licensee? And even if you buy from a secondary licensee, Microsoft still makes money on licensing fees as per the states' proposal because Microsoft would be entitled to receive a reasonable royalty for its intellectual property. It's as if the states are trying to help Microsoft spread its wares even further with this solution.

I cannot recall any settlement in antitrust history where a solution to a monopoly was to further expand existing and/or potential markets with the monopolist's products. The law seems to require quite the contrary. 15 U.S.C.A. Sect. 2. Yet at every turn, counterproposals

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seem to actually expand the adoption and/or reach of Microsoft's products. Microsoft suggests donating software, which would further saturate the educational market. The states suggest entry into alternative markets from which Microsoft will benefit by way of increased licensing revenues. Even merely giving cash to schools for purchasing software (as suggested by some commentators) will tend only to strengthen Microsoft because it will continue to benefit from its monopoly position.

Buying Market Share

Witness its Xbox game console. Microsoft's Xbox retails for \$299, but it is rumored to lose about \$125 on every unit it sells. So, perhaps, it is not surprising that Microsoft is willing to spend money on capturing more of the education market.

Microsoft Gets Everything It Gives

For example, even if Microsoft gives cash to the schools, Apple, likely, still will get screwed. Assuming Microsoft gives the schools \$1 billion for computers and software, Microsoft will still win market share and its actual costs will remain low. Why? The schools will hand most of Microsoft's money right back to it to buy software, and the government will also end up kicking some money back to Microsoft. Even if half the schools buy Macintosh computers (which is roughly Apple's market share in the educational market), the schools will still buy Microsoft Office. Microsoft Office costs a lot more than a license for plain old Windows. And let's face it, if Microsoft ever kills Office on the Macintosh, it will have terrible consequences for the platform; and if someone were to speculate what a nasty monopolist would do when given a chance, then one might speculate that such a nasty monopolist would kill Mac Office, which would force the remaining 4% of the computing world over to Windows. The point being, one way or the other, a large portion of any cash settlement will come back to Microsoft by way of software purchases, and Microsoft will still be able to leverage its products unfairly across markets. Furthermore, Microsoft will be able to write off the \$1 billion settlement as a loss and recoup from around one third from the government. I.R.C. Sect. 162(g); Tax Reg. Sect. 1.162-22. In the end, a cash settlement still will cost Microsoft relatively little while at the same time it still will increase its market dominance, and the reason why remains the same. They are a monopoly.

Just Because You Used To, Doesn't Mean You Still Can

A little example may be in order. If you are Acme Inc. with 1% of the PC market and wish to bundle your screen saver with your PCs, no problem. The government might even hold you up as a "go getter" in the sense that you are trying to compete to win market share. However, if Acme starts to win more and more market share and later owns 99% of the market, then giving its screen saver away for free might be considered to be dumping, tying, predatory pricing, and/or the like illegal activity because it is now a monopoly. So there are some things, i.e., the very kinds of things, that are encouraged in a competitive and open market that become illegal once you attain the status of a monopoly. *Wolfson v. Artisans Sav. Bank*, 428 F.Supp. 1315, 1321 (D.Del. 1977).

Nothing the government is currently proposing is designed to change that fundamental reality. Apparently the only arguments that proponents of the proposed settlement provide is that at least a cash settlement would cause Microsoft to lose some money. However, that seems to miss a great irony of why Microsoft is supposedly being punished in the first place. As any M.B.A. will tell you, Microsoft, as with any other corporation, wants to own every market to maximize returns for its investors. Owning the education market would help Microsoft shore up its current dominance by getting young people "hooked" on its products. By getting kids hooked early, they are less likely to try other systems because the cost of learning a new system is not insubstantial. Furthermore, Microsoft certainly shows it is

willing to invest money to gain market share.

Thus, such a settlement, arguably, can be viewed as just a cost of doing business to garner market share. The irony is that a monopolist is not allowed to give products away or sell them at a loss.

Xbox Errata

With the government practically abetting a convicted monopolist in anticompetitive practices on its core products, there seems little likelihood that there will be an investigation into Microsoft's Xbox pricing and other tactics used to enter and buy out the gaming market; tactics that arguably may violate other antitrust laws. Of course that didn't stop me from buying one as it is the most incredible gaming platform I've ever seen (particularly with Halo, the formally independent producers of which have been bought out by Microsoft), but I digress.

Such predatory pricing and/or dumping tactics are normally illegal for a convicted monopolist. U.S. v. Columbia Steel Co., 334 U.S. 495, 530 (1948); Western Concrete Structures Co., Inc. v. Mitsui & Co. (U.S.A.), Inc., 760 F.2d 1013, 1018 (9th Cir. 1985). Thus, it is currently illegal for Microsoft to give its software to the educational market for free or at a price below its costs because they have been found to be a monopoly. However, if the government agrees to Microsoft's proposed settlement with the states, then the government will at the very least be providing Microsoft with an exception to this rule, or at worst be a collaborator in illegal predatory pricing and dumping. It is not even clear if DoJ may allow the states to settle with Microsoft when the settlement terms, arguably, further require breaking the antitrust laws.

Setting up an end-game as beautiful as this certainly deserves adulation in the annals of business history. The lawyers at Microsoft must be dancing jigs of joy all day long at the thought that the government may actually require the company to increase its software penetration in various markets and in some cases be allowed to use tactics that otherwise would be illegal.

Microsoft's proposed settlement, which is ostensibly a punishment for anticompetitive monopolistic practices, is refreshing in its outright obnoxiousness. They deserve kudos for selling their proposal without anyone questioning the fundamentals. Microsoft has managed to frame the settlement so that people are not questioning how, where, and/or why it should be punished, but boiled things down to only a question of how much it should pay.

Kids Are Irrelevant

I suppose people are afraid to question giving money and resources to the schools "for the kids." And don't get me wrong, I'm all for improving education in the United States. In this case, however, the kids simply don't deserve this money. That is because the greatest harm befell the public at large and countless innovative software companies (their creditors, employees, investors, etc.), which were driven out of business, stunted from pursuing markets for fear of oblivion, and/or never materialized because Microsoft's presence and practices were too ominous an obstacle. Those are the people that were primarily smashed and/or pushed around by Microsoft as mentioned throughout its antitrust trial. If any one industry was wronged and deserves recompense, it is the software industry as a whole (excluding Microsoft of course). Yet no one is even considering directing damages to the software industry when it was the clear victim. This is shameful; the kids are not more deserving here. And if you think I'm being a big meany, please refrain from being a big ole hypocrite and don't bitch if (heaven forbid) your home is burned down, and then the arsonist decides it would be better to give money for rebuilding your home "to the kids." Regardless of where the money should ultimately go, it's amazing the choice of where it should go

has not been the subject of much, if any, debate or dispute.

Government Bargain

The government, save for a few states, certainly doesn't seem to have questioned anything all that much. The DoJ's perspective seems to be "we've told Bill he's been naughty, and he promised he'd be good." Microsoft has promised to be a good monopoly, however, Microsoft's outright cheap (offering to expend a few million in actual costs while claiming it's worth \$1.6 billion while knowing the states are likely to collect over \$14+ billion if the case goes through trial is at the very least thrifty) and duplicitous proposed settlement, its structure, and the chosen market should be evidence itself as to how solemnly it regards its obligation to be a good monopoly.

Generally, it is questionable if it is even possible to be a good monopoly. Supposedly a good monopoly is one that doesn't engage in "anticompetitive" practices (IP right holders and their government sanctioned monopolies withstanding, which is a topic for another day). Wolfson, 428 F.Supp. 1321; Intel, 195 F.3d 1346. That seems to imply that Microsoft should then engage in competitive practices. Yet, that's what Microsoft has been doing all along, i.e., competing like crazy, and why it's in trouble now. Or perhaps the government would like Microsoft not to be competitive so that the rest of the industry will be able to compete with an artificially handicapped monopoly? Neither solution seems to result in a truly competitive market. The only solution proposed, so far, that would result in a situation where Microsoft and the rest of the industry could all truly compete is where Microsoft's hold over the industry is broken.

Break-up Complimentary

Microsoft's brilliant business practices have made it a dominant force. Bill Gates and company truly deserve a great deal of praise for demonstrating incredible business and political acumen. I'm not trying to be sarcastic and my praise is genuine when I say that Bill Gates is the best businessman ever to walk the earth. Truly the highest compliment the government and President Bush could pay Mr. Gates would be to regard him as one of the greatest American success stories of all time. Mr. Gates should be in an elite cadre of moguls who won at playing the American dream. Just like J.D. Rockefeller's Standard Oil, Bill Gate's Microsoft needs to be broken up.

Yet the DoJ, after winning the antitrust case against Microsoft, has gone from promoting a break-up as a remedy to shunning it for a settlement with the apparently coincidental arrival of the Bush administration. Why settle a case on poor terms now? To be sure, there are reasons to settle after winning a case, but these usually revolve around the strength and cost of an appeal. The government claims it has a solid case on appeal, and the cost of an appeal is irrelevant (relative to the ramifications of a poor settlement) to both Microsoft and the DoJ. So, once again, why settle a case on such unfavorable terms after winning on the merits!?

You don't have to be much of a conspiracy theorist to surmise that the Bush administration's inexplicably chummy perception of Microsoft has influenced the DoJ's about-face and acceptance of a Microsoft settlement. Certainly, the DoJ seems to have some interesting interpretations of what a just punishment is for a convicted monopoly that has driven away and/or killed off some of the world's most creative competitors by means other than merit.

Leveraging Honor Unwise with Monopolists

The break-up solution at least addresses the unfair leverage Microsoft uses across markets by exploiting its Internet browser (Internet Explorer), operating system (Windows) and application suite (Office) line of products. The proposed settlement of giving money to schools will do nothing to reduce the inter-market leverage that Microsoft enjoys. In fact, giving the schools money for software and

training will likely only increase the dependency those schools have on Microsoft's products. Furthermore, the DoJ settlement relies on Microsoft being "good" and somehow tempering its extremely competitive nature. Perhaps the DoJ should spread this new punishment policy to convicted serial murderers and set them free assuring us that they promised to be good in the future. No real argument seems to have been given as to why anyone can expect Microsoft to suddenly become and remain a good monopoly when it has thus far been incapable.

However, history provides an argument to the contrary. Moguls are competitive. Successful companies are competitive. The very nature and manner of competing that was at one time legal, encouraged and the cause of their successes (e.g., lowering prices, building market share, driving lesser competitors out of business) have (in many instances) become illegal practices once they were found to be monopolies. *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911); *Wolfson*, 428 F.Supp. 1321; *Intel*, 195 F.3d 1346. As such, moguls and their successful companies are more likely to continue their practices simply from inertia. Certainly, Microsoft's latest acts seem indicative of anticompetitive recidivism: dropping Java from Windows XP will not help SUN; selling Xboxes at a loss seems to leverage its financial power derived from one market to move into another; disabling non-Microsoft web browsers from accessing MSN demonstrates that even if Microsoft makes its proprietary source code variations to HTML open, it still likely will induce users to stick with Microsoft branded browsers rather than being hassled and jostled from services during the lag time it will take for licensees to implement any new proprietary "features" to obtain parity with the official Microsoft version; and using heavy handed licensing tactics in its Software Assurance Program (SAP--make up your own jokes) has garnered wide criticism for forcing a licensing strategy to make users upgrade more frequently than desired.

If history serves as any lesson, a competitive mogul like Bill Gates will not become less competitive until he's declared an official winner and has no choice but to stop competing. There seems to be only one way to be declared a winner in the U.S. and that's through break-up as enjoyed by J.D. Rockefeller and Standard Oil. *Standard Oil*, 221 U.S. 1. There is no reason to believe that Bill Gates and Microsoft will stop employing anticompetitive tactics until they are forced to stop competing with the full force of monopoly power. Anything less than a forced break-up will leave Bill Gates and Microsoft with the status of being mere contenders not important, successful, or dangerous enough to warrant a government break-up. It's doubtful Bill Gates could be satisfied with such a runners-up title. Thus, the government should provide Mr. Gates and Microsoft with the closure they deserve and declare them winners officially. In a certain sense, I believe Mr. Gates would be able to enjoy his victory having fought the good fight. If not, he can try to become the first person in the U.S. to have two of his companies broken up by the government.

I will not rehash why Microsoft's proposal for (please place tongue in cheek) "justice" (please release tongue now--thank you) is akin to sentencing a serial murderer to work as an executioner at a prison and trying to pass it off as a "community service." As long as Microsoft is allowed to exist as a monopoly, it will be nearly impossible to punish it in any meaningful way so as to provide disincentive from abusing its power.

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